No. 74-521

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of Rogers C.B. Morton, Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case, denying judicial enforcement of civil penalties assessed against the respondent coal mine operators for violations of the safety standards of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.*

OPINIONS BELOW

The opinion of the court of appeals, as amended (App. A, *infra*, pp. 1a-16a) is reported at 495 F. 2d

38.[1] The opinion of the district court (App. D, *infra*, pp. 21a-24a) is not reported.[2]

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 17a-18a) was entered on March 20, 1974. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on June 4, 1974 (App. C, *infra*, pp. 19a-20a). On August 23, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to make a decision incorporating findings of fact before a civil penalty can be assessed against a coal mine operator, even though the operator has waived his right to an administrative hearing.

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[1] The court of appeals opinion of March 20, 1974, was amended on June 12, 1974. The amendment corrected a statement in the original opinion respecting the issuance by the Secretary of substantive guidelines for assessing civil penalties (App. A, *infra*, p. 12a).

[2] Three separate enforcement proceedings were consolidated in the court of appeals. The district court opinion in *Morton* v. *G.M.W. Coal Company*, Civ. No. 72-890, is reprinted in App. D. The district court orders in *Morton* v. *Delta Mining, Inc.*, Civ. No. 72-857, and *Morton* v. *Edward Mears*, Civ. No. 72-928, the two other consolidated cases, granted the operators' motions for summary judgments for the reasons stated in the *G.M.W.* opinion.

2. Whether, in light of the availability of *de novo* judicial review, the absence of detailed findings of fact in the administrative proceedings is fatal to the Secretary's action to enforce the penalties assessed.

STATUTES AND REGULATIONS INVOLVED

1. Section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756, 30 U.S.C. 819(a)(1), provides:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Section 109(a)(3) of the Act, 83 Stat. 757, 30 U.S.C. 819(a)(3), provides:

> A civil penalty shall be assessed by the Secretary only after the person charged with a viola-

tion under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

Section 109(a)(4) of the Act, 83 Stat. 757, 30 U.S.C. 819(a)(4), provides in pertinent part:

If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. * * * The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's

findings, the court shall determine the amount of the penalty to be imposed. * * *

2. 30 C.F.R. Pt. 100, as promulgated on January 16, 1971 (36 F.R. 779-780), is reproduced in App. E, *infra*, pp. 25a-32a. This is the regulation under which the penalties in this case were assessed.

30 C.F.R. Pt. 100, as reissued effective August 1, 1974 (39 F.R. 27558-27561), is reproduced in App. F, *infra*, pp. 33a-56a. This is the regulation now in effect.

STATEMENT

1. *The statutory scheme.* The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.* ("the Act"), establishes health and safety standards to protect the Nation's coal miners and requires each operator of a coal mine and every miner to comply with such standards. Sections 2(g)(1) and 2(g)(2) of the Act, 30 U.S.C. 801(g)(1) and (2).[3] The Act requires the Secretary of the Interior to assess and collect civil penalties for violations of these standards by coal mine operators and miners.[4]

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[3] The health and safety standards are set forth in Titles II and III of the Act, 30 U.S.C. 841, 861, *et seq.* The implementing regulations are in 30 C.F.R. Pts. 70, 75 and 77.

[4] The Act was passed after extensive Congressional hearings into the problems of coal mine health and safety, occasioned by a coal mine disaster at Farmington, West Virginia, in November 1968 that killed 78 miners. The House Report stated: "For too long the Congress has countenanced the passage of piecemeal measures which have failed to provide the Bureau with the enforcement power it needs. Too many injuries and too many lives have filled the gap left by inade-

Section 109(a)(1) of the Act provides that coal mine operators shall be subject to a civil penalty not exceeding $10,000 for each violation of a mandatory health or safety standard. In determining the amount of the penalty, the Secretary is required to consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 819(a)(1).

Section 109(a)(3) of the Act states: "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did

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quate laws. A strong law is necessary to protect the men who extract one of our Nation's most vital resources. Coal miners deserve the safest, healthiest work environment our technology will enable us to provide." H. Rep. No. 91-563, 91st Cong., 1st Sess. 6; Leg. Hist. 558, 563. The penalty provisions of Section 109 were enacted as one of the chief enforcement tools of the Act. S. Rep. No. 91-411, 91st Cong., 1st Sess. 36-39; Leg. Hist. 1, 36-39.

House and Senate debates are reprinted, along with the House, Senate and Conference reports, in a one-volume Committee Print entitled Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (cited herein as "Leg. Hist.").

occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid." 30 U.S.C. 819(a)(3).

If the penalty is not paid, the Secretary must file a petition for judicial enforcement of the order in the district court of the district where the mine is located. The court then determines all relevant issues *de novo*, and the operator has a right to a jury trial on any disputed issues of fact. 30 U.S.C. 819(a)(4).[5]

2. *Initial proceedings below.* Pursuant to Section 109(a)(4) of the Act, the Secretary brought separate actions in the district court to enforce unpaid civil penalty assessments against the respondents for violations of the safety standards of the Act and the regulations promulgated thereunder.[6] The administrative assessment orders were attached to the complaints in each case. Each order recited the particular notices of violation on which the penalty assess-

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[5] The mine operator is not entitled to relitigate issues of fact "which were or could have been litigated in review proceedings before a court of appeals under section 106 of [the] Act." 30 U.S.C. 819(a)(4). Section 106 authorizes limited judicial review of determinations of the Secretary under Section 105 of the Act, including the validity of withdrawal orders and abatement periods for notices of violation. There were no such issues in the instant cases, since there had been no prior proceedings under either Sections 105 or 106 of the Act.

[6] The penalties assessed against respondents were: $375 against Delta Mining, Inc.; $5,525 against G.M.W. Coal Company, Inc.; and $2,000 against Edward Mears, *et al.*

ments were based[7] and the administrative penalty assessment for each violation. For example, in the Secretary's complaint against respondent Delta Mining, Inc., the attached order of assessment totalling $375 recited six notices of violation issued to the operator on January 24 and 26, 1972, for violations of specified safety standards, with penalty assessments ranging from $30 to $90 for each violation.[8] The Secretary's complaint against each of the respondents stated that no hearing had been requested and that the penalty assessment had become the final order of the Secretary, but had not been paid; each

[7] A written notice of violation must be promptly issued by the coal mine inspector to the operator when he discovers a violation. Section 104(f), 30 U.S.C. 814(f). It must contain "a detailed description of the condition or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard * * *." Section 104(e), 30 U.S.C. 814(e).

[8] In the final orders of assessment in each case, the Assessment Officer certified: "I hereby find that the violations cited in the proposed order of assessment dated [date] did, in fact, occur and accordingly adopt the assessment set forth therein as final." The proposed order in each case stated in relevant part: "[C]onsideration having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged: it is hereby ordered that [name of operator] be and the same is hereby assessed a civil penalty in the amount of [amount] for the following violation: [listing of notices of violations, date issued, regulation violated and proposed assessment]."

complaint therefore prayed for judgment in the amount of the assessment order.

Each of the respondent mine operators answered the complaint against it, denying liability; each also moved for summary judgment, contending that the assessment orders were unenforceable because the Secretary had not complied with Section 109(a)(3), since the assessment orders were allegedly not accompanied by findings of fact that a violation had occurred, and that the amount of the penalty was warranted.

The Secretary opposed the respondents' motions, arguing that the requirement in Section 109(a)(3) for a "decision incorporating * * * findings of fact" applied only when the mine operator requested the "public hearing" guaranteed by that Section, and that it had no application in circumstances where, as here, the operator had waived his right to an administrative hearing.[9]

[9] Under the regulations in effect at the time the penalty assessments were made, the Assessment Officer issued proposed assessments in each case after considering the statutory factors, 30 C.F.R. 100.2(a), 100.4(c); App. E, *infra*. Each respondent protested the proposed assessments, whereupon the Assessment Officer reconsidered them, concluded they were correct, and reissued them, 30 C.F.R. 100.4(d), 100.4(g); App. E, *infra*. The respondents could then have obtained a formal hearing on the assessments by a timely request, 30 C.F.R. 100.4(h), App. E, *infra*. At that hearing, the agency would have had the burden of proof, and the administrative law judge would have rendered a decision incorporating findings of fact, 30 C.F.R. 100.4(i), App. E, *infra*; 43 C.F.R. 4.587, 4.593. Since no such hearing was requested, the proposed order became the final order of the Secretary. 30 C.F.R. 100.4(h), App. E, *infra*.

3. *District court decisions.* On March 15, 1973, while these cases were before the district court, the United States District Court for the District of Columbia enjoined the Secretary of the Interior from utilizing or enforcing the preliminary assessment procedures of Part 100, concluding that Section 109 (a)(3) of the Act requires the Secretary to incorporate findings of fact in all penalty assessment determinations, whether or not a hearing is requested. *National Independent Coal Operators Association* v. *Morton*, 357 F. Supp. 509 (hereafter referred to as the "*NICOA*" case). As a result of this injunction, the Secretary suspended Part 100 on April 24, 1973, and replaced it with interim formal hearing procedures for all cases, pending an appeal of the NICOA decision (38 Fed. Reg. 10085).[10]

On May 25, and June 28, 1973, the district court in the instant enforcement actions granted summary judgment to the respondent mine operators (see Apps. B and D, *infra*).[11] Agreeing with the district court's decision in *NICOA*, the court concluded that the penalty assessment orders sought to be enforced did not comply with the requirements of Section 109(a)(3) of the Act, since they did not contain findings of fact.

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[10] Although some modifications had been made in the Part 100 procedures in June 1972 (37 Fed. Reg. 11861-11862), the procedures enjoined in *NICOA* were substantially the same in all material respects as those under which the respondents' penalties were assessed.

[11] See note 2, *supra*.

4. *Appellate decisions.* The Secretary appealed the judgments in both circuits, arguing that Section 109(a)(3) requires a decision incorporating findings of fact only where the operator requests formal adjudication, and that, in any event, the availability of *de novo* judicial review in the Secretary's enforcement action cures any shortcomings of this sort in the administrative procedures.

On February 11, 1974, the District of Columbia Circuit reversed the district court's decision in *NICOA*, concluding that Section 109(a)(3) "does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication." *National Independent Coal Operator's Association* v. *Morton*, 494 F.2d 987, 994 (C.A.D.C.) (App. G, *infra*, pp. 57a-73a, 73a).[12]

The decision of the District of Columbia Circuit in *NICOA* was brought to the attention of the Third Circuit, but that court declined to follow it. In its decision of March 20, 1974, the Third Circuit held

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[12] *NICOA's* petition for rehearing was denied on April 24, 1974, and the mandate of the court of appeals issued on May 8, 1974.

NICOA has filed a petition for a writ of certiorari in that case, No. 73-2066. We are opposing that petition, since that case, unlike the instant one, involves no controversy of continuing importance meriting review by this Court. The regulations enjoined by the district court in that case have been extensively revised. The validity of the prior regulations has current significance only in the context of pending enforcement actions, as in the instant case. There can be no enforcement actions in the District of Columbia, since there are no coal mines there.

that the plain language of Section 109(a)(3) requires the Secretary to accompany each final assessment order with a decision incorporating findings of fact regarding the determination of the amount of the penalty,[13] "whether or not the operator requests a hearing" (App. A, *infra*, p. 9a). The court recognized the Secretary's concern "that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions"; it nevertheless concluded that it would be inappropriate "to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act" (*id.* at 13a).

In a footnote, the court of appeals stated that it had "considered and rejected" the Secretary's alternative argument that the *de novo* enforcement procedure in the district court cured any defects in the

[13] The court stated that the final decision of the Secretary "must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty" (App. A, *infra*, p. 16a). However, the court's discussion of the issues was entirely confined to the manner of determining the amount of the penalty, and there was no discussion of the sufficiency of the old Part 100 procedures with respect to the finding of the fact of violation. The court did not hold that the findings of fact concerning the existence of the violations were inadequate, and we think it clear that, whether or not such findings are necessary in all cases, they were sufficiently provided under the old Part 100 procedures. Since all assessment orders identify the notices of violation upon which they are based, and those notices contain the specifics of the alleged violation, the findings in those notices constitute sufficient findings of fact to support the conclusion that the violation occurred.

findings of fact accompanying the administrative assessment order (*id.* at 16a n. 32).

5. *Reissuance of Part 100 with substantive assessment guidelines.* A revised Part 100 has been adopted by the Department of the Interior, which became effective on August 1, 1974. This procedure establishes an assessment formula for determining proposed penalties pursuant to Section 109(a)(1) of the Act (App. F, *infra*, pp. 33a-56a). Under this system, all proposed assessments will be accompanied not only by a recitation of the notice of violation [14] and the amount of the penalty, but also by formula determinations ("penalty points") pertaining to each of the six statutory criteria.[15]

REASONS FOR GRANTING THE WRIT

1. Although the procedures disapproved in this case have been substantially revised, the decision below, if unreversed, will significantly interfere with the effective enforcement of the Federal Coal Mine Health and Safety Act. There is a substantial backlog of cases filed or ready for filing in the district courts—more than 2,400 separate actions, involving an estimated 24,000 individual violations—in which

[14] See p. 8, n. 5 *supra*.

[15] Under the reissued Part 100, as in the case of the former Part 100, the operator's failure to request a hearing within a specified time (now 30 days) after service of a proposed assessment order (and opportunity for a conference) will result in a final assessment order enforceable in the district courts. 30 C.F.R. 100.4(c) (App. F, *infra*, p. 51a).

penalties were assessed under the original version of Part 100.[16] In all of these cases the Secretary is seeking enforcement of penalty assessment orders, not accompanied by specific findings relating to the amount of the penalty, that became final under the original Part 100 as a result of the operator's failure to request a hearing.

The Third Circuit has held that these assessment orders are invalid under Section 109(a)(3) of the Act because none of them is accompanied by a decision incorporating findings of fact regarding the determination of the amount of the penalty; and, for this reason, none of them may be enforced in actions in the district courts under Section 109(a)(4) of the Act. Accordingly, none of the 150 cases presently pending in the Third Circuit may proceed to trial or resolution, but each must be abandoned or commenced anew in administrative proceedings in which the kind of decision and findings called for by the Third Circuit are made.

The fate of the cases pending in the other circuits is unclear. Neither the Fourth nor the Sixth Circuits, where most cases are pending or would be brought, has spoken to the issue. The District of Columbia Circuit held in *NICOA* that the original Part 100 procedures were valid, since the Act does not require a formal decision with findings of fact when an operator fails to request a hearing. Although no enforcement proceedings can be brought in the District of Columbia (since no coal mines are located there), the split in the circuits concerning the validity of the procedures under which the outstanding penalty assessments were made leaves the Secretary, the mine operators, and the district courts in other circuits in doubt as to how they should proceed in regard to the pending enforcement proceedings.

[16] That is, the version originally issued in 1971 which was modified in 1972 and suspended in 1973. See note 10, *supra*.

The Secretary could of course reassess the penalties in all the pending district court cases, utilizing the procedures of the new Part 100.[17] Although we believe that the penalty determinations reached in applying the new Part 100 constitute sufficient "findings of fact" to meet the Third Circuit's requirement, a large section of the industry does not share this position.[18] Thus, further litigation on the matter could be expected even if the penalties in all of the 2,400 pending district court cases were reassessed under the new Part 100.

More significantly, to reassess all of these cases (involving an estimated 24,000 individual violations occurring some 2 to 4 years ago) would be a staggering task and would severely hamper the Interior Department's effort to keep up with current violations and assessments, a program already suffering

[17] The Secretary does not consider that he has any power under Section 109(a) of the Act to abandon these assessments, and, in any event, does not consider that abandonment would be consistent with the purposes and policy of the Act.

[18] See the comment of the *National Independent Coal Operator's Association* respecting the new Part 100 (App. F, *infra*, p. 38a).

from unacceptable delays and backlogs. And, of course, if the courts should ultimately reject the revised procedures, this monumental task would have been undertaken in vain.

Uncertainty concerning the validity of the original Part 100 procedures, and even the revised ones, has a further practical adverse effect on the agency's enforcement of the Act. About 80,000 violations of the Act are discovered each year; a penalty must be assessed for each one. Therefore, it is clearly essential that most cases be settled by voluntary payments or settlements with the operator. But the uncertainty concerning the validity of the procedures significantly affects the mine operator's willingness to make such payments or settlements. Since the imposition of civil penalties is one of the major means adopted by Congress to encourage mine operators to improve safety and working conditions in the Nation's coal mines, disruption of the administrative enforcement procedure arising from the need to redetermine a vast number of past cases, combined with uncertainty about the procedural requirements of the Act, jeopardizes the accomplishment of the congressional goals.[19]

[19] Moreover, since no hearings were requested in any of the more than 2,400 pending cases, the operator's refusal to pay the assessed penalty is unlikely as a practical matter to be based upon any desire to contest the occurrence of the violation or the amount of the penalty. Instead, the basic issue in most of these cases is likely to be the validity of the administrative procedures upon which the final orders were based. Thus, resolution of that issue by this Court will probably avoid the necessity for further litigation in most of those cases.

Accordingly, a prompt determination by this Court of the validity of the original agency procedures will substantially contribute to the effective enforcement of the Act, the prime purpose of which—the health and safety of the Nation's coal miners—Congress declared a matter of first priority and concern. 30 U.S.C. 801(a).

This Court has granted certiorari in similar instances, where the impact of a holding on the administration of a federal statute is severe (*e.g.*, *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 299) or where it is important to determine the controlling principle for settlement of many claims (*e.g.*, *United States* v. *Powell*, 330 U.S. 238, 240; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 n.2). This is particularly so where there is a conflict among the circuits on the point, *Federal Trade Commission* v. *Jantzen, Inc.*, 386 U.S. 228, and it is so even where the statutes or regulations in question have since been repealed or modified, see *Alaska* v. *American Can Co.*, 358 U.S. 224, 225.

2. The court below was in error in concluding that Section 109(a)(3) of the Act requires that all penalty assessments must include specific findings of fact. The language of that Section is, we submit, ambiguous.[20] The main thrust of the section is to provide an opportunity for a hearing. The language concerning a "decision * * * incorporating findings

[20] The District of Columbia Circuit recognized in *NICOA* that the provision is "logically capable of two different constructions." App. G, *infra*, p. 64a.

of fact" is sensible only if read as ancillary to the hearing requirement. This reading of the statute was adopted by the court of appeals in *NICOA*,[21] is supported by the legislative history of Section 109 (a)(3),[22] and, as the Third Circuit itself seemed to recognize, avoids a requirement which "may hobble efforts at effective enforcement of the Act's penalty provisions" (App. A, *infra*, p. 13a).[23]

The effective enforcement problem arises from the large number of violations for which penalties must be assessed—about 80,000 a year. But since the penalty for most of these violations is small—about the size of a traffic ticket[24]—summary procedures,

[21] In *NICOA* the court of appeals cited decisions of this Court holding that, even where a statute requires a hearing, no hearing need be afforded where no disputed issue of fact is raised. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39-44. See also *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 620-622. *A fortiori*, no findings of fact are required "where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing" (App. G, *infra*, pp. 67a n. 30, 68a).

[22] The legislative history is discussed in detail in the court of appeals' opinion in *NICOA* (App. G, *infra*, pp. 68a-73a).

[23] Any requirement for a *formal* decision with narrative findings of fact in all uncontested cases would certainly hobble efforts at effective enforcement of the penalty provisions of the Act.

[24] The Department of the Interior advises us that in a random sampling of 50 enforcement actions presently pending in the district courts, involving final assessments under the old Part 100 for 484 individual violations, the number and amount of the final assessment for each violation were as follows:

Number of violations	Amount of assessment
207	$25 or less
87	$26 to $50
75	$51 to $100
96	$101 to $500
5	$501 to $1,000
3	$1,000 to $2,000
11	Over $2,000
484	

similar to those widely used for violations of Motor Vehicle Codes, are appropriate. In both circumstances, the operator is adequately informed of the particular violation involved, either by the traffic ticket or the notice of violation given to the coal mine operator. Both may obtain a hearing if they believe the original enforcement action is arbitrary or erroneous. But if they forego their right to a hearing and to require their accuser to prove his case, they have no real basis for complaint when confronted with an effort to enforce the result reached following their default. Cf. *Farncomb* v. *Denver*, 252 U.S. 7, 11-12; *Palmer* v. *McMahon*, 133 U.S. 660, 668-669.

3. In any event, the availability of further *de novo* consideration in the district court, whether or not there has been an administrative hearing, cures any possible defects in the agency procedures.[25]

[25] Under these circumstances, the court below incorrectly concluded that findings of fact would facilitate judicial review. Cf. *Pittsburgh S.S. Co.* v. *Brown*, 171 F.2d 175, 178 (C.A. 7) (agency findings are immaterial when judicial review is *de novo*).

The court below cited no reason or authority for its failure to follow the general rule that holds that procedural defects at one level are not fatal where *de novo* review is available at another level. See *Pittsburgh S.S. Co.* v. *Brown*, 171 F.2d 175, 178 (C.A. 7); *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F.2d 281, 290 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys.

NOVEMBER 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
UNITED STATES DEPARTMENT OF THE INTERIOR

v.

DELTA MINING, INC.

United States of America,
Appellant in No. 73-1752

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
UNITED STATES DEPARTMENT OF THE INTERIOR

v.

G. M. W. COAL COMPANY, INC.

United States of America,
Appellant in No. 73-1753

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR

v.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, individually, and as partners t/d/b/a M. Y. COAL COMPANY

United States of America,
Appellant in No. 73-1848

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

D.C. Civil Nos. 73-857, 72-890, 72-928

Argued January 10, 1974

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*

JOHN L. MURPHY, Chief
Government Regulations Section
Criminal Division

RICHARD I. CHAIFETZ
Attorney
Department of Justice
Washington, D.C.

Of Counsel:

RICHARD L. THORNBURGH
United States Attorney

Attorneys for Appellant

FREDERICK R. BLACKWELL, ESQ.
FRANKLYN E. CONFLENTI, ESQ.
Cauley, Birsic & Conflenti

Attorneys for Delta Mining, Inc. and G. M. W. Coal Company, Inc.,

HAROLD R. SCHMIDT
Rose, Schmidt and Dixon
Attorney for Edward Mears, et al.

OPINION OF THE COURT

(Filed March 20, 1974)

ADAMS, *Circuit Judge*

The question on this appeal is whether, under the Federal Coal Mine Health and Safety Act,[1] the Secretary of Interior may assess civil penalties against mine operators without making and publishing factual findings. The district court, in which the Secretary sought enforcement of assessment orders against the defendant mining companies,[2] held that the orders were invalid because of the absence of such findings, and the Secretary appealed.

The Act was passed in 1969 to "protect the health and safety of the Nation's coal miners." [2a] At various times during 1971, inspectors of the Bureau of Mines, Department of Interior, entered and inspected the coal mines operated by the various defendants, seeking to determine the extent of compliance or non-compliance with the Act, and with the regulations promulgated thereunder.[3] During the course of these visits the inspectors detected a number of violations

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[1] 30 U.S.C. §§ 801 *et seq.*

[2] Separate enforcement proceedings were brought against G.M.&W. Coal Co., Inc., Delta Mining, Inc. and Edward Mears, d/b/a M. Y. Coal Company. The cases involve identical issues, and so the appeals were consolidated in this court. The several apellee coal companies are referred to herein collectively, as "defendants."

[2a] 30 U.S.C. § 801(g)(1).

[3] 30 C.F.R., Ch. 1, subch. 0.

of the Act or the regulations. In each such instance, an inspector served the defendant in question with a notice of the infraction. Each notice stated that the particular violation had to be abated by a certain date. On the date set for abatement, the inspector returned to the mine and, upon determining that the violations had in fact been abated, furnished the defendant with a notice to that effect.

After the abatement of each violation and the notification of the defendant involved, the local office of the Bureau of Mines sent copies of the notices of violation and abatement to the Bureau's central office in Washington, D.C. There an Assessment Officer reviewed the various notices and sent proposed penalty assessment orders to the defendants.[4]

The proposed penalty assessment orders informed each defendant that the Assessment Officer, after giving "due consideration" to certain statutory criteria, intended to assess civil penalties in various amounts; that the defendants could protest the assessments in writing; and that the defendants had a right, secured by statute, to request hearings. Each defendant protested the orders.[5] However, the

[4] In most instances, the Assessment Officer consolidated several violations into one proposed penalty assessment order.

[5] When a protest is made to a proposed order, the Assessment Officer may either vacate, modify or affirm the proposed order. If the proposed order is vacated, the proceeding ends there; if it is modified or affirmed, the violator has the right to seek a hearing, which is held at a location as near as possible to the coal mine involved.

Assessment Officer did not consider that a reduction in the size of the penalties was called for, and he accordingly notified the defendants of his affirmance of the proposed orders.

The defendants were also notified, upon affirmance of the proposed orders, that they had 15 days in which to request a hearing, and that upon their failure to do so within the prescribed time the proposed orders would become the final orders of the Secretary. No hearings were requested and the final orders of the Secretary were entered. When the defendants failed to pay the assessments set forth in the final orders, this action for enforcement was brought in the district court.[6]

Section 109(a)(3) of the Act[7] provides in part as follows:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing, and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5."

[6] Section 109(a)(4) of the Act, 30 U.S.C. § 819(a)(4), provides for actions in the district courts to enforce penalty assessment orders.

[7] 30 U.S.C. § 819(a)(3).

Section 109(a)(1)[8] enumerates six factors to be considered by the Secretary in determining the amount of any penalty assessment:

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The proposed orders of assessment which the defendants received from the Assessment Officer were on preprinted forms which recited, in some instances, that the six factors set out in the statute had been considered.[9] The final orders entered by the Secretary did not mention the six statutory criteria at all, but merely set forth the Secretary's finding that a violation "did, in fact, occur." [10] The defendants contend, and the district court agreed, that in omitting from

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[8] 30 U.S.C. § 819(a)(1).

[9] One proposed order lists, as having been considered, the six criteria of section 109(a)(1). Some of the others state that consideration has been given to "all available information, including the gravity of the violation."

[10] The "finding" that a violation "did in fact, occur,"—which is required under section 109—was originally made by the Assessment Officer. Curiously, the Assessment Officer did not make the finding of violation, in some cases, until several months after the entry of the proposed orders of asessment.

the final orders express findings of fact relating to the statutory criteria for determining the amount of the penalty, and so providing no assurance of any considered application of these criteria, the Secretary failed to satisfy the requirements of section 109(a)(3).

The Secretary counters that the language of that section, requiring a "decision incorporating his findings of fact therein," applies only when a defendant has requested an oral hearing, and that when, as here, the Secretary makes a "decision" without any hearing, it is unnecessary under the statute to include any findings of fact.[11] We reject this contention and affirm the district court's grant of summary judgment in favor of the defendant mine operators.

We note that, in ordering penalty assessments without making express findings, the Secretary was acting pursuant to, and in apparent conformity with, the pertinent Regulations of the Department of Interior.[12]

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[11] The Secretary characterizes the entry of a final order after failure of the violator to request a hearing as a type of "default judgment," and argues that since the operator has willingly forfeited his "day in court," he will not be heard to object to the absence of findings. This reasoning is appealing but, as will be shown, not applicable.

[12] 30 C.F.R. Pt. 100, effective January 14, 1971. The Part 100 Regulations were amended in some small details on June 15, 1972, and were indefinitely suspended on April 24, 1973. *See* 39 Fed. Reg. 10085, 4/24/73. The references in this opinion are to the Regulations in force between January 14, 1971 and June 15, 1972.

Regulation 100.4(h)[13] provides that once a proposed order of assessment has been made, the operator charged shall have 15 days in which to accept such order of the Assessment Officer or to seek a "formal adjudication." Acceptance, or failure to request an adjudication, results under the Regulation in the proposed order becoming "the final assessment order of the Secretary." Thus, the Regulations appear to contemplate the very procedure that was utilized here: a proposed order became final without the Secretary himself making findings on the question of penalty amount.[14] The question before us then, narrows to whether Regulations themselves, as implemented, were consistent with the requirements of the Coal Mine Health and Safety Act.

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[13] 30 C.F.R. § 100.4(b). There are other Interior Regulations (60 C.F.R. § 301.50, now 43 C.F.R. Part 4) dealing with penalty assessments, the relevance or validity of which we do not pass upon here.

[14] It is apparent that the "findings" of the Assessment Officer on the issue of penalty amount, where made, were little more than *pro forma* recitations that the pertinent statutory criteria had been considered. *See* Note 7, *supra*, and accompanying text. In view of the realities of the penalty assessment procedure, we reject the contention that the "findings" as to penalty amount set out in some of the proposed orders were the sort of findings contemplated by section 109. Mere recitation that the statutory criteria for gauging penalty amounts have been given "due consideration" will not convince us "that the agency has . . . really taken a 'hard look' at the salient problems and has . . . genuinely engaged in reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied, 403 U.S. 923 (1971).

As noted above, the Act provides that a civil penalty may be assessed only after the operator "has been given an opportunity for a public hearing." The language of the Act would appear to require also that, whether or not the operator requests a hearing, the assessment *must* be made "by [the Secretary's] decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted." The Secretary seeks refuge from this interpretation by pointing to the legislative history, which, he asserts, supports his reading of section 109.

Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted.[15] There is not a modicum of evidence in the reports from either House of Congress,[16] nor in the Conference Committee report on the compromise bill that became section 109,[17] that would indicate an intent to dispense with findings of fact where no hearing is requested.

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[15] Indeed, the statutory language appears so unequivocal that we question whether resort to legislative history is even appropriate in interpreting section 109. *See* Schiaffo v. Helstoski, No. 72-2167/68, (3d Cir., Jan. 4, 1974), slip op. at 25, 26; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).

[16] *See* H. Rep. 91-563, 91st Cong., 1st Sess., and S. Rep. 91-411, 91st Cong., 1st Sess. The documents are included in Legislative History of Federal Coal Mine Health and Safety Act, compiled by the House Committee on Education and Labor, at pp. 569, 93, respectively.

[17] *See* H. Rep. 91-781, 91st Cong., 1st Sess.

Another consideration, apparent on the face of section 109, tends to indicate that findings are required when a violator does not seek a hearing as well as when he does. When a hearing is requested, the section 109 triggers the application in that proceeding of section 5 of the Administrative Procedure Act [18] which, by incorporating section 8 of the APA,[19] requires that the final decision of the Secretary be accompanied by findings. Thus the language in section 109 itself requiring findings would be merely duplicative if it did not refer to some situation other than that in which a hearing is requested and held. While duplication and repetition in statutory language are certainly not unheard of, it would seem a salutary rule to avoid reading the terms of a statute as mere surplusage in the absence of some proof that they were so intended. Lacking such proof here, we conclude that Congress intended *every* final assessment order of the Secretary to be accompanied by findings of fact.[20]

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[18] 5 U.S.C. § 554.

[19] 5 U.S.C. § 557.

[20] The Secretary also mounts a semantic argument against the district court's construction of the statute, by asserting that the word "therein" in section 109 refers to the *hearing*, and not to the "decision" of the Secretary. Thus, he claims, when no hearing is held, there can be no "findings of fact therein." Since the word "decision" follows "hearing" in the statute, the most natural and probable referent of "therein" is "decision," not "hearing." Words in statutes ordinarily should be accorded their most common, everyday meanings.

[Footnote continued on page 11a]

Findings of fact, explicit and public, are necessary to assure that the administrative process not degenerate into arbitrariness or, worse, into discrimination and spite.[21] Thus, though flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, "we cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion." [22] Judicial review of a final administrative determination is heralded as a right,[23] and such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings.[24]

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[20] [Continued]

See, e.g., McBoyle v. United States, 278 U.S. 41, 48 (1928). Nor can we fail to note that section 109 makes a second use of the word "therein," the referent of which is clearly "decision" and not "hearing." *See* text accompanying note 7, *supra*.

[21] *See* Note, *Administrative Findings Under Section 8(B)* [of the APA], 51 Va. L. Rev. 459, 462-64 (1965); K. C. Davis Discretionary Justice, ch. VI (1969).

[22] Environmental Defense Fund, Inc. v. Rucklehaus, 439 F.2d 584, 596 (D.C. Cir. 1971).

[23] *See* PBW Stock Exchange, Inc. v. Securities and Exchange Comm'n, 485 F.2d 718, 750 (3d Cir. 1973) (*dissenting opinion* of Adams, J.).

[24] *See* Environmental Defense Fund, Inc. v. Ruckleshaus, *supra*, 439 F.2d at 598: "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . Discretionary decisions should more often be supported with findings of fact and reasoned opinions." *See also* K. C. Davis, *supra*, at 103-106.

Though it might not be beyond Congress' power to provide for the entry by the Secretary of penalty assessment orders without findings of fact, such a provision would run against the grain of much of our administrative jurisprudence. The Secretary has failed to adduce any evidence that Congress intended, in enacting section 109, to permit some final determinations to be entered without such findings. Indeed, there is substantial evidence, on the face of the statute, just to the contrary. We therefore hold that the assessment orders in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid.[25]

In so holding, we observe that the Bureau of Mines had not, at the time these assessments were made established or adopted any detailed guidelines to assist Assessment Officers in the application of the six statutory criteria set out above for the exaction of civil penalties. The absence of any such guidelines led the Comptroller General, in a report on the Bureau of Mines,[26] to state that:

> "We [the Comptroller General] were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in [400] sample cases.
>
> * * * *

[25] As noted in Note 9, *supra*, the Part 100 Regulations have now been indefinitely suspended.

[26] Report by the Comptroller General to the Conservation and Natural Resources Subcommittee, House Committee on Government Operations, entitled "Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969" (July 5, 1972).

> ". . . [T]he mine operators did not know how the factors should be considered and weighed in determining the amount of the penalty." [27]

Guidelines would go far toward assuring that penalty assessments bear a real and substantial relation to the six congressionally-selected factors. In the absence of such guidelines—and their promulgation is for the Secretary, not the courts—the clear mandate of section 109 must suffice. That mandate requires, at a minimum, that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount.

We are in full sympathy with the goals and spirit expressed in the Coal Mine Health and Safety Act, and we have listened with concern to the Secretary's claim that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions. Yet, we do not consider it appropriate to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act. Though the attainment of safe, reasonably healthy conditions in the coal mines is a commendable statutory objective, so too is the assurance that no one, be he miner or coal magnate, be treated arbitrarily or discriminatorily in any administrative proceeding.

Moreover, it may well be that the requirement of findings of fact in every case will mitigate, not wor-

[27] *Id.* at 25-26.

sen, the administrative burden cast upon the Secretary by his duty to enforce the Act. Where the proposed orders entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings. That is to say, without some positive indication of the Secretary's basis for calculating a particular assessment, an operator cannot make a reasoned judgment whether a penalty is a fair one, or a merely arbitrary exaction. Thus, by making explicit findings of fact in each instance—that is, by making public a process that ought to be undertaken anyway—the Secretary may well forestall numerous costly and time-consuming adjudicative proceedings.

We are aware that, only recently, the District of Columbia Circuit reached a conclusion concerning the Act that is at odds with our holding in this case. In National Independent Coal Operators' Ass'n v. Morton,[28] that court reasoned that "the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed," and that "[w]here no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which

[28] No. 73-1678 (D.C. Cir., Feb. 11, 1974).

merely would consist of the same information already contained in the proposed assessment order." [29]

At least two considerations serve to distinguish the cases before us from that apparently confronting the District of Columbia Circuit in *National Independent*. First, in the cases before us, the defendant operators' failure to request a hearing in no way suggests that the appropriateness of the penalty amount went undisputed. In each instance, the operators lodged protests with the Assessment Officer, indicating that the propriety of the amounts was a hotly contested issue. In these circumstances, we are reluctant to infer from the operators' failure to request hearings that their objections to the penalty amounts suddenly ceased. There are other equally plausible reasons, cost and inconvenience among them, to explain the defendants' failure to seek formal hearings.

Second, a decision by the Secretary which sets out his findings of fact in these cases and thus demonstrates a considered application of the criteria of section 109, would not "consist of the same information already contained in the proposed assessment order." As indicated above, the proposed assessment orders in this case contained *no* "information" other than *pro forma* recitations that the six criteria for determining penalty amount had been considered. Thus, findings of fact in these cases would provide the operators with information they had not yet

[29] *Id.*, slip op. at 9.

received, information to which, under our view of the Act, they are entitled.[30]

Thus, at least in the context of these enforcement actions,[31] we adhere to the view that each final decision of the Secretary must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty.[32]

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[30] The District of Columbia's decision in *National Independent* appears to buck the drift of much of that Court's prior administrative jurisprudence. *See, e.g., Ruckelshaus* and *Greater Boston Television*, supra; D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972); Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Station KFH v. FCC, 247 F.2d 570 (D.C. Cir. 1957).

[31] *National Independent, supra,* involved a suit to enjoin application of the civil penalty assessment procedures embodied in the Pt. 100 Regulations.

[32] We have considered and rejected two other contentions of the Secretary, (1) that the enforcement procedure in the district court cures any defects in the Secretary's final order, and (2) that by failing to object to the lack of findings in any administrative proceeding the defendants have failed to "exhaust administrative remedies," and so are barred from objecting in the courts. In connection with the second contention, we note that once a final order has been entered, there is no opportunity to lodge an objection with the Secretary or Bureau of Mines.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, Secretary of Interior,
United States Dept of Interior

vs.

DELTA MINING, INC.

United States of America, Appellant in No. 73-1752
(D.C. Civil Action No. 73-857)

ROGERS C. B. MORTON, Secretary of the Interior,
United States Department of the Interior

vs.

G. M. W. COAL COMPANY, INC.

United States of America, Appellant in No. 73-1753
(D.C. Civil Action No. 72-890)

ROGERS C. B. MORTON, Secretary of the Interior,
United States Dept of the Interior

vs.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, Individually, and as partners t/d/b/a M. Y. COAL COMPANY

United States of America, Appellant in No. 73-1848
(D.C. Civil Action No. 72-928)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

Present: ADAMS, HUNTER and WEIS, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed May 25, 1973, in No. 73-1752 and No. 73-1753, and filed June 28, 1973, in No. 73-1848 be, and the same are hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn
Clerk

March 20, 1974

Certified as a true copy and issued in lieu of a formal mandate on June 12, 1974.

Test: Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, Secretary of Interior,
United States Department of the Interior

v.

DELTA MINING, INC., U.S.A. appellant in No. 73-1752

v.

G. M. W. COAL COMPANY, INC.,
U.S.A. appellant in No. 73-1753

v.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS,
et al.—U.S.A. appellant in No. 73-1848

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: June 4, 1974

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 72-890

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,
PLAINTIFF

vs.

G.M.W. COAL COMPANY, INC., DEFENDANT

MEMORANDUM

This action was instituted by Rogers C. B. Morton, Secretary of the Interior, to enforce three civil penalty assessment orders against the defendant, G.M.W. Coal Company, Inc. for alleged violations of the Federal Coal Mines Health & Safety Act (hereinafter referred to as "the Act") pursuant to § 109 (a) (4) of the Act, 30 U.S.C.A. § 819(a) (4). The defendant has filed a Motion for Summary Judgment asserting, inter alia, that the procedures followed by the Secretary in assessing these penalties did not comply with § 109(a) (1) and (3) of the Act, 30 U.S.C.A. § 819(a) (1) and (3).[1]

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[1] Sec. 109 (a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the

It is the contention of the defendant that the Secretary failed to meet the requirements of the Act in that he failed to consider the six factors enumerated in 109(a)(1), 30 U.S.C.A. § 819(a)(1) in determining the amount of the penalty and he failed to incorporate his findings of fact when determining that a violation had in fact occurred as required by § 109(a)(3), 30 U.S.C.A. § 819(a)(3).

In support of this contention the defendant attacks the Proposed Orders of Assessment which it received from the authorized assessment officer. Each of the proposed orders is on a pre-printed form, the most

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Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

detailed of which recites within the form that the six factors enumerated in the statute have been considered, another recites that the gravity of the violation has been considered, and in the third order no mention is made of the factors considered in arriving at a penalty amount.

The finding by the Secretary that a violation had in fact occurred is also on a printed form which states in its entirety, "I hereby find that the violations entered in the ———— proposed order of assessment dated ———— did, in fact, occur and accordingly adopt the assessment set forth therein as final."

As in *National Independent Coal Operators Association, et al.* v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil Action No. 397-72 U.S.D.C., it is clear that the proposed orders of assessment in the case sub judice as well as the final orders based thereon do not set forth "findings of fact" concerning either the occurrence of a violation or the amount of the penalty assessed. The express language of the Act makes it equally clear that an order of assessment must be supported by a "decision, incorporating his (the Secretary's) findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . . ." As did the court in *National Independent Coal Operators Associatoin, et al.*, supra, this court finds that the procedures leading to the orders sought to be enforced in the instant action did not comply with the requirements of sec-

tion 109(a)(1) and (3), 30 U.S.C.A. section 819 (a)(1) and (3).

IT IS ORDERED that the defendant's Motion for Summary Judgment be and the same is hereby granted.

/s/ Herbert P. Sorg
D.J.

Dated: May 25, 1973.

APPENDIX E

RULES AND REGULATIONS

[36 F.R. 779-80]

TITLE 30—MINERAL RESOURCES

CHAPTER I—BUREAU OF MINES, DEPARTMENT OF THE INTERIOR

SUBCHAPTER O—COAL MINE HEALTH AND SAFETY

Part 100 — Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

In accordance with the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173) and pursuant to the authority vested in the Secretary of the Interior under section 508 of the Act, Subchapter O of Chapter I, Title 30, Code of Federal Regulations, is amended by adding a new Part 100, as set forth below, which provides procedures to be followed by the Bureau of Mines in assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Federal Coal Mine Health and Safety Act of 1969.

Section 109 of the Act will be enforced, until further notice, in accordance with the procedures set forth in Part 100 which shall be reviewed from time to time in the light of enforcement experience gained under the Act.

Since these regulations are procedural in nature and are promulgated to obtain an immediate maxi-

mum enforcement effort by the Bureau of Mines under the Coal Mine Health and Safety Act of 1969, and are intended to insure a maximum compliance effort under the Act on the part of the coal mining industry, Part 100 shall become effective on the date of its publication in the FEDERAL REGISTER (1-16-71).

FRED J. RUSSELL
Under Secretary of the Interior.

JANUARY 14, 1971

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Liability for civil penalties; policy.
100.4 Procedures for assessment of civil penalties; protest procedures.

Appendix A—Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91-173).

§ 100.1 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of mantaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effort [sic] on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§ 100.3 Liability for civil penalties; policy.

(a) *Withdrawal orders.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that leads to the issuance of an Order of Withdrawal, for example:

(1) A violation that creates an imminent danger;

(2) A repeated unwarrantable failure violation; and,

(3) A violation that is not abated in the reasonable time specified by the Bureau of Mines for total abatement.

The amount of the penalty for each such violation will not be more than $10,000.

(b) *Other violations*—(1) *Serious violations.* (i) A civil penalty will be proposed in accordance with the procedures established herein for each serious violation. The amount of the penalty for each such violation will not be more than $10,000.

(ii) For these purposes, a "serious violation" will be deemed to exist if there is a substantial probability that death or serious physical harm to the miners could result from a condition which exists, or from one or more practices which have been adopted or are in use.

(2) *Nonserious violations.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that is specifically determined not to be of a serious nature. The amount of the penalty, if any, for each such violation, will not be more than $10,000.

(3) *Absence of fault.* No civil penalty will be proposed for either a serious or nonserious violation if it is determined that the operator (i) did not, and could not with the exercise of reasonable diligence know of the presence of the violation, or (ii) did not and could not have available to him at the time of the inspection the equipment, material, personnel or technology required to avoid the violation. Each such determination will be documented in writing and will set forth the specific conditions and reasons that justify such a determination.

§ 100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b) (1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15

working days from the date of receipt of the Proposed Order of Assessment to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 109 of the Act. If a hearing is requested, the protest must so state.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

(i)(1) Where the operator or miner requests formal adjudication of the assessment penalty under section 109 of the Act, the Assessment Officer shall forward the matter to the Associate Solicitor for Mine Health and Safety who shall file a petition to assess a penalty with the Office of Hearings and Appeals of the Department of the Interior.

(2) The petition shall be served on the operator or miner who shall then answer the petition and be afforded an opportunity for a public hearing.

(3) The Office of Hearings and Appeals shall thereafter issue an order, based on Findings of Fact and Conclusions of Law.

(4) In assessing a penalty, the Office of Hearings and Appeals may redetermine the amount of the civil penalty for each violation in any amount not to exceed $10,000.

APPENDIX A

GUIDELINES FOR ASSESSMENT OF PENALTIES

Type of violations	*Penalty Range*
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000-$10,000
B. Other Withdrawal Orders	$1,000-$5,000
C. Serious Violations	$ 100-$1,000
D. Nonserious Violations	$ 25-$500
2. Miners:	
Smoking or the carrying of smoking materials, matches, or lighters	$ 25-$250

NOTE: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc. 71-748 Filed 1-15-71; 9:47 a.m.]

APPENDIX F

RULES AND REGULATIONS

[39 F.R. 27558]

Part 100 — Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

REVISION AND REINSTATEMENT OF PROCEDURES FOR INFORMAL ASSESSMENT

There was published in the FEDERAL REGISTER on May 8, 1974 (39 FR 16145-16151) proposed procedures for informal assessment of civil penalties for violations of the Federal Coal Mine Health and Safety Act of 1969. These proposed regulations were preparatory to reinstatement of the informal assessment program contained in Title 30, Code of Federal Regulations, Part 100, which had been suspended on April 24, 1973 (38 FR 10085). This suspension was in effect pending appeal of a decision and order of the United States District Court for the District of Columbia in "National Independent Coal Operators Association, et al. v. Rogers C. B. Morton, Secretary of the Interior, et al.," Civil Action No. 397-72 in which the District Court had declared unlawful the procedures set forth in 30 CFR Part 100. On February 11, 1974, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and upheld the validity of the Department's civil penalties procedures.

Interested persons were given 45 days in which to participate in the rulemaking process through submission of written comments, suggestions or objec-

tions. Comments were received from 12 operators, coal operator associations, legal representatives of operators, and the United Mine Workers of America. These comments have been received and studied and appropriate changes as explained below have been made. The Department expresses its sincere appreciation to those who took the time and care to read and study the proposal and offer their views.

The Bituminous Coal Operators Association as well as several other commenters expressed a strong desire that the regulations permit the operators to submit information prior to the receipt of the order of assessment. After careful consideration of this comment, the Department has decided to provide an opportunity for an operator to submit data concerning a violation within 15 days of its receipt by the operator.

Bethlehem Mines and the Old Ben Company made the comment that only one penalty conversion table should be used for all operators. The Department considered this to be a valid point as the lower penalty conversion tables did not reach a $10,000 maximum. Accordingly, a new penalty conversion table has been substituted for the five tables proposed. This new table, although adapted from Table 1, is somewhat different because it must be taken into account that the table will be applied to large and small operators alike and in addition that points will be added for size rather than deducting a negative percentage as was the case under the proposal. Accordingly, the Department has created a new

schedule 100.3(b)(1) for size of the mine which has a possible total of 10 points.

This change conforms with a comment made by the United Mine Workers that approves the addition formula in general, but suggested that the fines are too low. By elimination of the low tables, violations rated at equal penalty points will be assessed the same amount regardless of size.

Reavis, Pogue, Neal and Rose, a law firm representing several coal companies, Ziegler Coal Company, Peabody Coal Company and several other operators felt that the formula was weighted too heavily on the side of gravity and negligence and further required too much of a subjective evaluation of these criteria. In response to the first comment, the Department has reduced the maximum penalty points for gravity and negligence by 10 and 5 points, respectively. As to the subjective evaluation objection, the Department believes that this is an inherent part of the evaluation of negligence and gravity. The Assessment Office will attempt to be as uniform as possible in evalauting similar violations, however, each violation must be graded on its individual facts and in assessing gravity, one must consider the likely consequences of the violations. To reduce the subjectivity of gravity the categories within each subdivision have been reduced and the point assignment has been modified to a fixed number rather than a range.

The majority of the comments recommended that additional points should be provided for rapid com-

pliance after abatement of a violation. Accordingly, the Department has expanded the possible negative points in this criteria to minus 10. In addition normal compliance will receive no penalty points rather than the additional 5 points which had been originally proposed.

The Central Pennsylvania Coal Producers Association as well as several other coal operators requested that the 20-day time limits be expanded to 30 days in the regulations. This has been adopted where appropriate. Several commenters, including the Plateau Mining Company, are concerned that violations which have been vacated not be considered as part of an operator's previous history. Accordingly, the definition of previous history has been clarified to provide that previous history violations includes only those violations which have not been vacated as of the time of assessment. At the urging of several commenters, the Department has reevaluated its data for previous history and accordingly new tables are utilized in this criteria. The original tables which had been proposed were unduly weighted to consider surface mines and surface facilities of underground mine operators. Finally, § 100.3(i) has been amended to make clear that the formula may be waived in whole or in part in making special assessments. Criteria for making a special assessment will be explained further in the Office of Assessment Manual. These special assessments will be utilized in cases where evaluation of the violations convinces the Assessment Office that the formula would actually im-

pose an unfair penalty or an improperly low one. For example, violations which result in fatalities or have a high potential to cause a disaster might be considered for a special assessment, whereas violations which have unusual mitigating circumstances may also be conducted for a special assessment. A special assessment will be made in a narrative order. The criteria will be applied and explained in a narrative statement. There were several minor comments concerning: (1) Procedures permitting operators who so request to register agents for service of assessments, (2) provisions that statements at conferences not be used against the operator, and (3) provisions requiring the Assessment Office to use the new formula to the fullest extent possible in considering cases which such conference pursuant to § 100.8.

The Department did not feel that these comments warrant incorporation into regulations although it had no objections to the substance of the comments.

The United Mine Workers commented that they be allowed to participate in the informal assessment process at the conference level. The statute sets out that a penalty proceeding is between the government and an operator. Because of this the Department did not feel it could provide a mechanism for official UMW participation, however, in making its assessment the Assessment Office will consider all relevant data available to it. If information is submitted by a miner or representative of miners pertaining to a particular violation that information will be considered in making the assessment.

General comments were received to the effect that the penalties listed in the penalty conversion table were too high. As noted earlier the United Mine Workers feel the opposite. In attempting to achieve the remedial goals of the statute the Department seeks to assess a meaningful penalty. In fact many penalties assessed under the new formula will be different from those assessed under the old formula. This is so because of the sliding scale proposed by the use of the addition of points rather than the multiplication of factors as was previously the case.

[39 F.R. 27559]

The National Independent Coal Operators Association did not offer substantive comments on the regulations but rather criticized them as being illegal. As a precedent they cited the decision of the U.S. Court of Appeals for the Third Circuit in "Rogers C. B. Morton, et al. v. Delta Mining, Inc., GM&W Coal Corporation and Edward Mears, et al.," Nos. 73-1752, 1753 and 1848. The NICOA argues that any assessment procedures which does not require the submission of a penalty case to an administrative law judge for findings of fact in accordance with the Administrative Procedure Act is illegal.

The Third Circuit decision is in conflict with the District of Columbia Circuit decision mentioned above. However, in the Department's view the new procedures set forth below are in accord with both the District Court, and the Third Circuit decision. The Third Circuit distinguished the District of

Columbia Circuit's decision on the basis that the operator had filed a protest. Under these rules where an operator requests a conference (the equivalent of the old protest), all unresolved violations are forwarded to the Office of the Solicitor for filing with the Office of Hearings and Appeals to permit an opportunity for hearing and findings of fact by an administrative law judge.

Much effort has gone into preparation of these new procedures and the Department considers them to be a substantial improvement. The Department believes that this system permits a fair evaluation of the violation at an informal level. The new procedures will be reviewed periodically and additional improvements will be implemented.

The new rules will become effective August 1, 1974.

KENT FRIZZELL,
Acting Secretary of the Interior.

JULY 24, 1974.

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Determination of penalty.
100.4 Procedures for assessment of civil penalties.
100.5 Payment of assessed civil penalty.
100.6 Request for conference.
100.7 Request for hearing.
100.8 Civil penalty cases pending before the Office of Hearings and Appeals as of August 1, 1974.

AUTHORITY: Secs. 109, 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742, P.L. 91-173, 30 U.S.C. 801).

§ 100.1 Purpose.

The assessment of civil penalties under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties: general.

(a) Each Notice of Violation and Order of Withdrawal issued on or after August 1, 1974, shall be reviewed by the Office of Assessments, Mining Enforcement and Safety Administration, in accordance with the assessment procedures described in this part to determine liability of the operator or miner and the amount of penalty to be assessed.

(b) Each pending Notice of Violation and Order of Withdrawal issued prior to August 1, 1974, and not filed with the Office of Hearings and Appeals shall be reviewed by the Office of Assessments, Mining Enforcement and Safety Administration, in accordance with the civil penalty assessment procedures described in the Office of Assessments Manual, May 1973 and in 38 FR 10086, April 24, 1973 to determine liability of the operator or miner and the amount of penalty to be assessed.

(c) Each order of assessment against an operator shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

§ 100.3 Determination of penalty.

(a) The amount of the penalty assessed against an operator will be determined by a formula that takes into account the six criteria stated in § 100.2 (c). The formula will consist of assigning penalty points against the violation being assessed. Penalty points will be determined for each of the criteria stated in § 100.2(c) and totaled. These penalty points will be converted into a dollar amount by using the penalty conversion table in paragraph (g) of this section. The penalty points will be assigned within each of the six criteria according to the schedules in paragraphs (b) through (f) of this section.

(b) The appropriateness of the penalty to the size of the operator's business: The appropriateness of the penalty to the size of the operator's business is calculated on both the size of the mine cited and the size of the company. The size of the mine is taken into account by selecting the proper penalty points from the table listed in subparagraph (1) of this

paragraph. The size of the company is to be considered by using the schedule in subparagraph (2) of this paragraph.

(1) *Size of mine.*

Annual tonnage of mine	*Penalty points*
Under 50,000	0
Over 50,000 to 100,000	1
Over 100,000 to 200,000	2
Over 200,000 to 300,000	3
Over 300,000 to 500,000	4
Over 500,000 to 700,000	5
Over 700,000 to 900,000	6
Over 900,000 to 1.1 million	7
Over 1.1 million to 1.5 million	8
Over 1.5 million to 3 million	9
Over 3 million	10

(2) *Size of company.* The annual tonnage of the company to which the mine belongs will be considered in determining the appropriateness of the penalty to the size of the business of the operator, using the following schedule:

Annual tonnage of company	*Penalty points*
Under 100,000	0
Over 100,000 to 700,000	1
Over 700,000 to 1.5 million	2
Over 1.5 million to 5 million	3
Over 5 million to 10 million	4
Over 10 million	5

As used in subparagraphs (1) and (2) of this paragraph the term "annual tonnage" means the tonnage produced in the previous calendar year or in the case of a mine opened less than one calendar year

the amount of tonnage produced converted to an annual basis.

(c) History of previous violations: The history of previous violations of the Act will account for a maximum of 20 penalty points towards the total amount of penalty points assessed. The penalty points for history of previous violations will be derived from the following schedules:

(1) Average number of violations assessed per year in the preceding 24 months:

Number of violations	*Penalty points*
1 to 10	0
11 to 20	1
21 to 30	2
31 to 40	3
41 to 50	4
Over 50	5

(2) Average number of violations assessed per inspection day in the preceding 24 months:

Violations per inspection day	*Penalty points*
Over 0.3	0
Over 0.3 to 0.4	1
Over 0.4 to 0.5	2
Over 0.5 to 0.6	3
Over 0.6 to 0.7	4
Over 0.7 to 0.8	5
Over 0.8 to 0.9	6
Over 0.9 to 1.0	7
Over 1.0 to 1.1	8
Over 1.1 to 1.2	9
Over 1.2 to 1.3	10
Over 1.3 to 1.4	11

Over 1.4 to 1.5	12
Over 1.5 to 1.6	13
Over 1.6 to 1.7	14
Over 1.7	15

Previous History means all violations presently assessed that have not been vacated or dismissed at the time of assessment.

(d) Negligence: Negligence generally means committed or omitted conduct which falls below a standard of conduct established by law to protect persons against the risks of harm. The standard of care established under the Act is that the operator of a mine owes a high degree of care to the miners employed by him. A mine operator is required to be on the alert for conditions and hazards in the mine which affect the safety or health of his employees and to take the steps necessary to correct or prevent such conditions or practices. Failure to do so is negligent on the part of the operator. This criterion will contribute a maximum of 25 penalty points to the assessment total, divided between no negligence, ordinary negligence, and gross negligence. A violation which occurs through no [39 F.R. 27560] negligence of the operator will be assigned no penalty points for negligence. A violation which occurs through ordinary negligence of the operator will be assigned from 1 to 12 points depending on the specific facts involved. A violation which occurs through gross negligence of the operator will be assigned 13 through 25 penalty points depending on the specific facts involved. In determining the degree of negligence involved in a

violation and the amount of penalty points to be assessed, the following definitions apply:

(1) "No Negligence" means that the operator could not reasonably have known of the violation or under the circumstances the operator had taken reasonable precautions to prevent the violation.

(2) "Ordinary Negligence" means the operator either failed to exercise reasonable care to prevent the violation or failed to exercise reasonable care to correct a violation he knew or should have known existed.

(3) "Gross Negligence" means an operator either caused the condition or practice which occasioned the violation by exercising reckless disregard of mandatory health and safety standards or he recklessly or deliberately failed to correct an unsafe condition or practice he knew or should have known existed.

(e) Gravity: This criterion will contribute a maximum of 30 penalty points to the assessment total. The points will be applied from the following schedules:

(1) Probability of the occurrence of the event against which a standard is directed may account for a maximum total of 10 penalty points using the listed definitions and schedules.

Probability of occurrence:	*Penalty points*
Improbable	0
Probable	3
Imminent	7
Occurred	10

As used in this paragraph the following terms have the following meanings:

Improbable: Unlikely to happen.

Probable: That which is likely to occur.

Imminent: That which is likely to occur before the violation can be abated.

(2) Gravity of injury if it occurred or were to occur, using the listed definitions and the following schedule, may account for a maximum of 10 penalty points:

Gravity of injury normally expected:	*Penalty points*
Nondisabling	0
Disabling	3
Permanent Disabling	7
Fatal	10

Types of injury or illness expected if the event caused or could cause injury are defined as follows:

Nondisabling: Injury or illness, which would not result in lost time of one full day or more after the day of the injury.

Disabling: The injury or illness would cause the injured person to lose one full day of work or more after the day of the injury.

Permanent Disabling: An injury or illness which results in the total or partial loss or use of any member or function of the body.

Fatal: Any work related injury or illness resulting in death.

(3) Number of personnel affected if event occurred or were to occur.

Number of persons affected:	*Penalty points*
0	0
1	1
2	2
3	4
4 to 5	6
6 to 9	8
More than 9	10

(f) Demonstrated good faith of the operator charged in attempting to achieve rapid compliance: This criteria awards negative points for a manifestly conscientious effort to achieve rapid compliance, and can contribute a maximum of 10 points as indicated in the following schedule and definitions:

Degrees of good faith	*Penalty points*
Rapid	10
Normal	0
Lack of good faith	10

In determining the operator's good faith in attempting to achieve rapid compliance, the following definitions apply:

"Rapid Compliance" means there is demonstrated evidence that the operator has taken extraordinary measure to insure abatement of the violation in the shortest possible time.

"Normal Compliance" means the operator has abated the violation within the time given for abatement either originally or as extended.

"Lack of Good Faith" means the operator has been untimely and has not shown diligence and effort in attempting to abate the violation.

(g) Penalty conversion table: The penalty conversion table shall be used to convert the accumulation of penalty points to the appropriate assessment.

Penalty conversion table

Points	Penalty	Points	Penalty
1	2	33	82
2	4	34	86
3	6	35	90
4	8	36	94
5	10	37	98
6	12	38	102
7	14	39	106
8	16	40	110
9	18	41	115
10	20	42	120
11	22	43	125
12	24	44	130
13	26	45	135
14	28	46	140
15	30	47	145
16	32	48	150
17	34	49	155
18	36	50	160
19	38	51	170
20	40	52	180
21	43	53	190
22	46	54	200
23	49	55	210
24	52	56	220
25	55	57	230
26	58	58	240
27	61	59	250
28	64	60	275
29	67	61	300
30	70	62	325
31	74	63	350
32	78	64	375

Points	Penalty	Points	Penalty
65	400	83	1,750
66	425	84	2,000
67	450	85	2,250
68	475	86	2,500
69	500	87	2,750
70	550	88	3,000
71	600	89	3,500
72	650	90	4,000
73	700	91	4,500
74	750	92	5,000
75	800	93	5,500
76	900	94	6,000
77	1,000	95	6,500
78	1,100	96	7,000
79	1,200	97	7,500
80	1,300	98	8,000
81	1,400	99	9,000
82	1,500	100	10,000

(h) The effect on the operator's ability to continue in business: When information is submitted prior to assessment, it is initially presumed that the operator's ability to continue in business will not be affected by the order of assessment. The operator may also submit information to the Office of Assessments concerning this financial status to show that payment of the order of assessment will affect his ability to continue in business. If the information provided by the operator indicates that the order of assessment will adversely affect his ability to continue in business, the Office of Assessments may reduce the penalty.

(i) Waiver of use of formula to determine civil penalty: The Office of Assessments may elect to

waive in whole or in part the use of the formula contained in § 100.3 in determining the civil penalty for a violation of the Act if it deems that conditions concerning the violation warrant. Such special assessments shall take into account the six criteria in § 100.2(c) and all findings shall be in narrative form. All provisions of this part except the formula provisions of § 100.3 shall apply to such special assessments.

§ 100.4 Procedures for assessment of civil penalties.

(a) Within 15 days of service of a notice or order charging a violation of the Act, an operator or miner charged may submit any information pertaining to the violation involved to the Office of Assessments which has jurisdiction over the area in which the mine is located:

Mines in Coal Mine Health & Safety Districts 1, 2 & 3:

Office of Assessments
Federal Building
Pittsburgh & Peters Sts.
Uniontown, Penna. 15401

Mines in Coal Mine Health & Safety District 4:

Office of Assessments
L & S Building
Room 200
810 Quarrier Street
Charleston, W. Va. 25301

Mines in Coal Mine Health & Safety Districts 5, 6, & 9:

Office of Assessments
2195 Euclid Avenue
P.O. Box 29
Bristol, Va. 24201

Mines in Coal Mine Health & Safety Districts 7 & 8:

[39 F.R. 27561]

Office of Assessments
Jordan Building
1220 So. Broadway
Suite 402
Lexington, Ky. 40504

Any information so submitted will be considered by the Office of Assessments in reviewing the notice or order and determining the fact of violation and the amount of the penalty.

(b) The Office of Assessments shall, by certified mail, serve upon the operator or miner charged a copy of the order of assessment together with a copy of the Office of Assessments worksheets showing the formula computation prepared by the Assessment Officer.

(c) The operator or miner shall have 30 days from receipt of the order of assessment to either (1) pay the penalty, (2) request, in writing, a conference with the Office of Assessments to provide information relating to the violations listed in order of assessment, or (3) request, in writing, a hearing on the violations in question before the Department's Office of Hearings and Appeals pursuant to Subpart

F, Part 4, Title 43, Code of Federal Regulations. If the operator or miner does not exercise his right under this subsection within 30 days of receipt of the order of assessment, the order of assessment will be enforced under section 109(a)(4) of the Act.

§ 100.5 Payment of assessed civil penalty.

(a) Payment by the operator or miner of the assessed penalty will close the case.

(b) Payment of the assessed penalty should be sent to the field assessment office having jurisdiction over the area in which the mine is located or to:

Office of Assessment
Mining Enforcement and Safety Administration
Department of the Interior
Washington, D.C. 20240

Check should be made payable to the Mining Enforcement and Safety Administration and should list the Assessment Office Control Number for the case.

§ 100.6 Request for conference.

(a) The Office of Assessments shall provide a return mailing card with each order of assessment to allow the operator or miner to indicate his desire to have a conference. Upon receipt of such request, the Office of Assessments shall arrange for a timely conference convenient to both the operator or miner and the Office of Assessments.

(b) If the operator or miner requests a conference with the Office of Assessments, he may submit any additional material to the official assigned his

case which may be relevant to the fact of the violation or the amount of the penalty. Such information may be submitted prior to the conference and discussed during the conference. To expedite the conference, the official assigned to the case may contact the operator or miner to discuss the case prior to such conference.

(c) The Office of Assessments will consider all relevant information on the violation(s) in question presented by the operator or miner and is authorized to recalculate the assessed penalty on the basis of any new information presented to it. When the facts warrant a finding that no violation of the Act or a mandatory health or safety standard occurred, a penalty will not be assessed.

(d) If the operator or miner appears in person and the issues are resolved, he may, at this time, tender payment of the amount agreed upon and thereby dispose of the case, or he may have 10 days within which to submit payment to the Office of Assessments of the amount agreed upon and thereby dispose of the case. All such agreements must be in writing and signed by both parties. Failure to tender payment of the agreed amount within the 10-day period will result in the agreed amount being entered as the final order of the Secretary, enforceable under section 109(a)(4) of the Act.

(e) If all issues cannot be resolved during the conference, the operator or miner may settle those violations in agreement as provided in § 100.6(d)

and have those deleted from the case. Violations not resolved will be forwarded to the Associate Solicitor —Mine Health and Safety, who shall file a petition to assess a civil penalty with the Office of Hearings and Appeals of the Department of the Interior pursuant to 43 CFR 4.540.

§ 100.7 Request for hearing.

(a) The Office of Assessments shall provide a return mailing card with each order of assessment to allow the operator or miner to indicate his desire to have a hearing under section 109(a) of the Act. When an operator or miner requests a hearing, the Office of Assessments shall forward the case to the Associate Solicitor—Mine Health and Safety, who shall file a petition for assessment of civil penalty with the Office of Hearings and Appeals of the Department of the Interior pursuant to 43 CFR 4.540.

(b) The petition shall be served on the operator or miner, who, in accordance with the Department's Hearings and Appeals procedures (43 CFR 4.541), shall then have 30 days within which to file an answer to the petition and be afforded an opportunity for a public hearing.

(c) In accordance with 43 CFR 4.545, the Office of Hearings and Appeals shall thereafter issue an order, based on findings of fact and conclusions of law unless the petition is dismissed by consent of the parties.

(d) In assessing a penalty, the Office of Hearings and Appeals may determine de novo the fact of violation and the amount of the civil penalty, taking into consideration the six criteria specified in section 109(a)(3) of the Act.

§ 100.8 Civil penalty cases pending before the Office of Hearings and Appeals as of August 1, 1974.

(a) In all cases previously filed with the Office of Hearings and Appeals, which have not yet been heard or decided by an Administrative Law Judge, an operator may file with the Office of Hearings and Appeals a request for a conference with the Office of Assessments as provided in § 100.4(b)(2). Such request must be postmarked on or before 30 days after the effective date of this part.

(b) Such request should identify the civil penalty case by name, docket number and assessment control number and be addressed to:

Office of Hearings and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

The Office of Hearings and Appeals will promptly notify the Office of Assessments of those cases which have timely requested a conference.

(c) The submission of a timely conference request in those cases described in paragraph (a) of this section will operate to stay further proceedings pending holding of the informal conference, but shall in no instance warrant dismissal of the pending case. Failure to resolve the issue involved in the case by

conference will result in the stay of proceedings being dissolved.

[FR Doc. 74-17293 Filed 7-29-74; 8:45 am]

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1678

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL.

v.

ROGERS C. B. MORTON (SECRETARY OF THE INTERIOR OF THE UNITED STATES) ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided February 11, 1974

Michael Kimmel, Attorney, Department of Justice, with whom, *Irving Jaffe*, Acting Assistant Attorney General, *Harold H. Titus, Jr.*, United States Attorney, *Kathryn H. Baldwin*, Attorney, Department of Justice, and *J. Philip Smith*, Assistant Solicitor, Department of the Interior, were on the brief for appellants. *Arnold T. Aikens* and *Robert M. Werdig, Jr.*, Assistant United States Attorneys, also entered an appearance for appellants.

John L. Kilcullen for appellees.

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: Under the Federal Coal Mine Health and Safety Act of 1969 [1] the Secretary of the Interior is charged with enforcing mandatory health and safety standards in the nation's coal mines. Pursuant to this authority the Secretary may assess civil penalties against operators of coal mines in which health and safety violations occur.[2] The present action challenges the procedures adopted by the Secretary to assess these penalties.

Plaintiffs, an association of coal mine operators and various individual coal mine operators, seek an injunction and declaratory relief on the ground that the civil penalty assessment procedures embodied in 30 C.F.R. Pt. 100 violate the procedural requirements of Section 109(a)(3) of the Act, 30 U.S.C. § 819(a)(3) (1970). The district court granted summary judgment for the plaintiffs and permanently enjoined the Secretary from utilizing or enforcing the challenged procedures.[3] Because we find the Secretary's procedures to be legal under the Act as we interpret it, we reverse.

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[1] 30 U.S.C. §§ 801 *et seq.* (1970) (Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 742) [hereinafter referred to as the Act].

[2] 30 U.S.C. § 819 (1970).

[3] National Independent Coal Operators Ass'n. v. Morton, 357 F. Supp. 509 (D.D.C. 1973).

I

When a coal mine inspector discovers a health or safety violation he delivers a notice of violation to the mine operator.[4] This notice contains "a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard . . . ." [5] For example, a notice of violation submitted to this court by the parties describes the violation as follows:

> [At 12:40 P.M. on December 21, 1971, an] accumulation of float coal dust was present in the No. 3 return entry 3 south off 1 Main West for a distance of about 1,500 feet.[6]

Over 227,000 notices of violation were issued from the effective date of the Act, March 30, 1970, through June 30, 1973.[7]

The Act requires that for each violation of a mandatory health or safety standard the mine operator "shall be assessed a civil penalty by the Sec-

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[4] 30 U.S.C. § 814 (1970). The notice of violation requires the mine operator to correct the violation within a specified period. *Id.* § 814(b). In addition to issuing a notice of violation, if the inspector finds that an imminent danger exists, he may direct that all personnel be withdrawn from the area until the danger is abated. *Id.* § 814(a).

[5] *Id.* § 814(e).

[6] Jt. App. at 85.

[7] Brief for Appellant at 18 & n.22. There were in excess of 100,000 notices of violations per year.

retary . . . ." [8] In view of the immense number of violations, the Secretary promulgated rules and regulations establishing preliminary procedures to be followed in assessing civil penalties.[9] It is these preliminary procedures which are challenged in the present action.

The regulations provide that after a notice of violation is issued it is reviewed by an Assessment Officer who determines "the liability of the operator . . . for a civil penalty and the amount of penalty to be proposed." [10] The Act prescribes six factors which the Secretary must consider in determining the amount of the penalty,[11] and the Secretary's regula-

[8] 30 U.S.C. § 819(a)(1) (1970). The net amount assessed under the Part 100 procedures from January 16, 1971 to March 9, 1973 exceeded $24,500,000. Brief for Appellant at 18 n.23.

[9] 30 C.F.R. Pt. 100 (1973). These procedures were adopted in January 1971, 36 FED. REG. 779-80, and were amended in certain respects in June 1972, 37 FED. REG. 11459-60, 11861-62. Since the entry of the district court's order enjoining the preliminary procedures, such procedures have been suspended, 38 FED. REG. 10085 (April 24, 1973), and all penalty assessment cases are being processed under the formal hearing procedures of 43 C.F.R. §§ 4.540 *et seq.*, as revised, 38 FED. REG. 10086-87 (April 24, 1973).

[10] 30 C.F.R. § 100.3(a) (1973).

[11] In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 819(a)(1) (1970).

tions specifically require the assessment officer to consider all relevant circumstances, including the six factors specified in the Act.[12]

After reviewing the notice of violation and determining an appropriate amount for a civil penalty, the assessment officer serves a Proposed Order of Assessment upon the mine operator. This proposed assessment order refers to the particular violation, specifies the amount of the proposed penalty,[13] and advises the mine operator that he has 20 days from receipt of the order either to protest the proposed penalty or to petition for hearing and formal adjudication.[14] If the operator fails timely to protest or request a formal hearing, "he shall be deemed to have waived his right of protest and his right of formal adjudication with opportunity for hearing,

[12] 30 C.F.R. § 100.3(c) (1973). *See also id.* § 100.2(a).

Subsequent to the district court's injunction, the Secretary amended the assessment procedures to utilize an "assessment formula." 38 FED. REG. 10086 (April 24, 1973). This formula calculates the appropriate penalty in a particular case by assigning numerical values to each of the six statutory factors. *See* Brief for Appellant at 13-17. Although the Secretary has represented to this court that the assessment formula will be retained even if the district court's judgment is reversed, we need not consider the assessment formula in deciding the present case. *Id.* at 12, 13.

[13] 30 C.F.R. § 100.3(b)(2) (1973).

[14] *Id.* § 100.3(d). The operator may protest the order either partly or in its entirety.

and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior." [15]

In the event that the operator protests the proposed order, the assessment officer may reconsider in light of the operator's arguments and redetermine, amend or reissue the proposed order.[16] Upon amendment or reissuance of the proposed order, the operator again has 20 days to accept or reject it in whole or in part, and to request a hearing and formal adjudication.[17] If the operator does not file a timely request for a hearing and formal adjudication, the amended or reissued proposed assessment order becomes the final assessment order of the Secretary.[18]

In the event that the operator does request a hearing,[19] the hearing is de novo [20] and the Secretary has

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[15] *Id.* § 100.3(e). The assessment officer may extend the time allowed for protest. *Id.* § 100.3(g)(1).

[16] *Id.* § 100.3(g)(2), (3).

[17] *Id.* § 100.3(h).

[18] *Id.*

[19] The petition for hearing and formal adjudication must be in writing and must include a list of the violations in issue. 43 C.F.R. § 4.541(a) (1972). Alternatively, the operator may attach to his petition a copy of the final proposed assessment order which clearly indicates the violations at issue. *Id.* § 4.541(b). Within 30 days of filing his petition, the operator must file a short and plain statement of the factual and legal issue, as well as a brief statement concerning the applicability of the six statutory criteria of 30 U.S.C. § 819(a)(1). *Id.* § 4.544(a).

[20] 30 C.F.R. § 100.5(b) (1973).

the burden of proving by a preponderance of the evidence that the violation occurred and that the penalty is warranted.[21] The hearing examiner must render a decision based solely on the record of the hearing,[22] incorporating findings of fact and conclusions of law.[23] Thus, throughout the preliminary procedures for assessing civil penalties, formal adjudication is available to a mine operator who either contests the occurrence of the violation or protests the amount of the proposed penalty.

II

Plaintiffs contend that these preliminary procedures violate the procedural requirements of Section 109(a)(3) of the Act which provides as follows:

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating

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[21] 43 C.F.R. § 4.587 (1972).

[22] *Id.* § 4.24.

[23] *Id.* § 4.593. The hearing examiner's decision is reviewable by the Board of Mine Operations Appeals. 43 C.F.R. §§ 4.1(4), 4.500(a)(2), 4.600 (1972).

If the formal adjudication is adverse to the operator he may obtain de novo judicial review of the penalty by not paying it and awaiting the Secretary's enforcement action in the district court. 30 U.S.C. § 819(a)(4) (1970). The same judicial review is available where the operator fails to request a hearing and allows the proposed assessment order to become final.

> his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

30 U.S.C. § 819(a)(3) (1970). Plaintiffs argue that this section requires a formal decision incorporating findings of fact in every case regardless of whether a mine operator waives his right to a formal hearing by failing to file an objection to the proposed assessment order. If plaintiffs' interpretation of the Act is correct, then the Secretary's preliminary procedures for assessing civil penalties are illegal because, absent a request for formal adjudication, the final assessment order issues without a decision which complies with the formal requirements of the Administrative Procedure Act.[24]

Section 109(a)(3) is logically capable of two different constructions. Plaintiffs would read the statute, even where no hearing is requested by the operator, as follows: "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, by decision incorporating his finding of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ."

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[24] 5 U.S.C. §§ 554, 557 (1970); *see* notes 25-28 *infra* and accompanying text.

The Secretary maintains that the requirement for a decision must be read in context and that the section as a whole describes the formal adjudicative process which is available to a mine operator upon his request. The Act clearly requires a formal decision whenever disputed issues are contested in a hearing. However, according to the Secretary's interpretation, the requirement for a formal decision of the character and extent for which appellant argues, is linked to the statutory guarantee of an opportunity for a hearing. Under this interpretation a formal decision is not required unless the mine operator takes advantage of that opportunity by requesting a hearing.

In deciding which is the proper interpretation it is helpful to identify the nature of the decision contemplated by the Act. The Act requires more than an "act of deciding."[25] The decision described in Section 109(a)(3) parallels the decision required by the Administrative Procedure Act (hereinafter APA) after a formal hearing has been conducted. The APA specifies that a decision following a hearing must include "(A) findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and (B) the appropriate rule, order sanction, relief, or denial thereof."[26] A decision under Section 109

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[25] WEBSTER'S NEW INTERNATIONAL DICTIONARY 860 (2d ed. unabr. 1961).

[26] 5 U.S.C. § 557(c) (1970).

(a)(3) must include (1) findings on the material issues of the occurrence of a violation and the amount of the penalty, and (2) an order requiring that the penalty be paid.[27] This similarity to a formal APA decision suggests that when a decision is required under Section 109(a)(3), it must contain "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." [28]

Plaintiffs would interpret the Act to require this kind of formal decision even though the mine operator wilfully chooses not to request a hearing on the proposed penalty. However, once given notice of his right to object, the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed. As the district court pointed out, in the absence of a request for a hearing the Secretary may act on the information available to him and need not adduce evidence for the other side.[29] Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order.

In situations where a statute prescribes a hearing prior to agency action the courts have held that the

[27] 30 U.S.C. § 819(a)(3) (1970).

[28] Automotive Parts & Accessories Ass'n. v. Boyd, 132 U.S. App.D.C. 200, 207, 407 F.2d 330, 337 (1968).

[29] 357 F.Supp. at 513.

agency need not conduct a hearing if no disputed issue exists.[30] "In such situations, the rationale is

[30] FPC v. Texaco, 377 U.S. 33, 39-44 (1964); Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n., 356 U.S. 282, 287 (1958); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Dyestuffs & Chemicals, Inc. v. Flemming, 271 F.2d 281, 286-87 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); *see* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 620-22 (1973).

In *United States v. Storer Broadcasting Co., supra,* the FCC had denied a license application without a hearing because the application established on its face a violation of a substantive FCC rule. Even though the governing statute required a "full hearing" before denial of an application, the Supreme Court concluded that where an application clearly contravened substantive rules, a hearing was unnecessary unless the application

> set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Id. at 205. Therefore, the statutorily prescribed "full hearing" was only required where the applicant demonstrated the existence of a disputed issue.

A similar situation exists in the present case. A notice of violation issued to a mine operator evidences a violation of the substantive health and safety standards established by Congress, and the proposed penalty assessment order is based upon the notice of violation. The operator is advised that he has the right to request formal adjudication and he is fully advised of the consequences of a failure to request such adjudication. If any mine operator objects to the notice of violation or to the proposed penalty and desires a formal decision, he need only request formal adjudication. As in the *Storer Broadcasting* decision, "the way for review is open." *Id.*

that Congress does not intend administrative agencies to perform meaningless tasks." [31] Similarly, as we interpret Section 109(a)(3), the Secretary need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing.

If the operator wants to contest the alleged violation or if he believes that his particular circumstances warrant a lesser penalty, he need only request a hearing and briefly describe the issues in dispute. Such a request puts the Secretary to his burden in a hearing of proving both the violation and the appropriateness of the penalty. Following the hearing the Secretary has the statutory responsibility for preparing a "decision incorporating his findings of fact therein." [32]

III

The legislative history of Section 109(a)(3) supports the foregoing interpretation of the statute with

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[31] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971).

[32] We thus interpret the Act to permit any mine operator who desires a formal decision on the alleged violation or the amount of the proposed penalty to obtain such decision merely by indicating his objection and making a simple request for a hearing. By failing to request a hearing he waives his right to formal adjudication. This procedure is analogous to the procedure in civil litigation where a defendant who fails to answer a complaint may have a default judgment entered against him. FED. R. CIV. P. 55.

respect to the decision requirement. Both the Senate and House bills, in the form in which each bill passed its respective house, required a formal decision only after a hearing had been conducted. The House bill provided:

> Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Secretary shall afford such operator an opportunity for a hearing and, *in accordance with the request*, determine by decision whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised.[33]

The Senate bill read as follows:

> An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title

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[33] H.R. 13950, 91st Cong., 1st Sess. § 109(b) (1969) (115 CONG. REC. 32064) (emphasis added). Most of the Act's legislative history is reprinted in a one-volume committee print. HOUSE COMM. ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY FEDERAL COAL MINE HEALTH AND SAFETY ACT (1970) [hereinafter cited as Legislative History]. H.R. 13950 § 109(b) appears in Legislative History at 932.

> 5 of the United States Code shall apply to any such hearing and decision.[34]

The italicized language demonstrates that under both the Senate and the House bills the requirement for a formal decision was clearly tied to the operator's request for a hearing.

Following passage in both houses, the respective bills were referred to a Conference Committee on the disagreeing votes between the two houses. Although the Conference Committee "adopt[ed] the Senate provision," [35] the Committee deleted the language italicized above. Thus the italicized language did not appear in Section 109(a)(3) of the Conference bill which eventually was enacted. The only explanation for this section appears as follows in the Conference Report:

> Both the Senate bill and the House amendment provided an *opportunity* for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any

[34] S. 2917, 91st Cong., 1st Sess. § 808(a)(3) (1969) (115 CONG. REC. 28256, Legislative History at 546) (emphasis added).

[35] H.R. REP. No. 91-761, 91st Cong., 1st Sess. 71 (1969) (Legislative History at 1033).

> notice or order involving a violation of a standard.[36]

We do not believe that the Conference Committee's deletion of the italicized language from the Senate bill reflected an intent to alter the procedural requirements of the bill. The Committee's concern was that the Act afford an *opportunity* for formal adjudication under 5 U.S.C. § 554 and the Conference Report emphasized that "[b]oth the Senate bill and the House amendment provided an *opportunity* for a hearing . . . ." [37] If, as plaintiffs suggest, the Committee intended to alter the bill's procedural requirements to require a formal decision where the operator did not avail himself of the opportunity for formal adjudication, one would expect the Committee to mention the change in the Conference Report. Their failure to do so, together with their statement that they adopted the Senate provision, indicates that the Committee deleted the italicized language because they considered it surplusage.

The district court expressed concern that the preliminary procedures adopted by the Secretary "would shift the initial burden to the mine operator charged with the violation," and that "Congress chose not to adopt such an approach when it was expressly proposed in the 'administration bills' of the proposed legislation." [38] We do not share the district court's

[36] *Id.* (emphasis added).

[37] *Id.* (emphasis added).

[38] 357 F. Supp. at 512.

concern. Requiring the operator to request a hearing and briefly describe the issues in dispute does not impose a significant burden upon the operator. At the hearing the burden remains with the Secretary to prove his case by a preponderance of the evidence.[39]

Furthermore, the legislative history does not reflect congressional disapproval of the procedures adopted by the Secretary. Although the administration bills did specify a procedure similar to that challenged here, the broad procedural requirements ultimately adopted are not inconsistent with the more detailed provisions of the administration bills.

The administration bills, as well as the bill approved by the House, specified that a mine operator must request a hearing in writing within 30 days after receipt of an assessment order.[40] The corresponding section of the Senate bill afforded the mine operator an opportunity for formal adjudication but did not detail the specific procedures for requesting a hearing.[41] The statement in the Conference Report, set forth above,[42] indicates that the Conference Committee considered the only significant difference between these sections of the bills to be the reference in the Senate bill to the Administrative Procedure Act, and that this slight difference was the reason it adopted the language of the Senate bill. In view of the explanation provided by the Report of the Conference Committee, we cannot conclude that Congress intended to disapprove the more specific procedure outlined in the administration bills.

[39] 43 C.F.R. § 4.587 (1972).

[40] The pertinent provision of the bill as approved by the House is set forth above. Note 33 *supra* and accompanying text. The corresponding provisions of the administration bills were virtually identical to the provision in the bill approved by the House. *See* S. 1300, 91st Cong., 1st Sess. § 113(b) (1969); H.R. 7976, 91st Cong., 1st Sess., § 113(b) (1969).

[41] Note 34 *supra* and accompanying text.

[42] Note 36 *supra* and accompanying text.

IV

We conclude that the Act does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication. Upon receipt of a proposed assessment order, if a mine operator wants to contest either the fact of violation or the amount of the proposed penalty, he need only request a hearing and briefly describe the issues in dispute. Following such a request the Secretary must provide formal adjudication in compliance with 5 U.S.C. § 554, including a formal decision. The Act does not require a formal decision where no hearing is requested and no issues are in dispute.

Reversed.

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